CASES CITED

	Page
Concessione Company vs. Morris, 409 Wash. 46	6
Federal Compress and Warehouse Company vs. McLean	5
Pacific Company Ltd. vs. Johnson, 285 U. S. 480	3
Pan American Petroleum Corporation vs. Alabama	7
People vs. Monne, 203 Cal. 782	6
People vs. Ventura Refining Co., 204 Cal. 286, 294	1
State Tax on Foreign Held Bonds, 82 U. S. 300, 319	3
Surplus Trading Company vs. Cook, 281 U. S. 647	2, 6
United States vs. Unzeuta, 281 U. S. 138	6

IN THE

Supreme Court of the United States

STANDARD OIL COMPANY OF CALIFORNIA, *Appellant*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Appellee*.

APPELLANT'S REPLY BRIEF.

The clear cut issues of federal and state jurisdiction and of the nature of the tax involved in this case are not to be confused by cases that are not apposite or conditions that do not obtain.

The facts are simple. The Attorney General of California concedes and the Supreme Court of California states in its opinion that the sale sought to be taxed was made in the Presidio and that federal jurisdiction over the Presidio is exclusive. The point of difference between us is the incidence of the tax. To determine this we look to the statute.

> "Every distributor shall * * * pay a license tax * * * for each gallon of motor vehicle fuel * * * sold and delivered by him in this state."

The tax is labelled a license tax. It is in effect a sales tax and the tax is ultimately paid by the consumer. The State Supreme Court has recognized this in People v. Ventura Refining Co., 204 Cal. 286, 294. But whatever the

tax be called, it has to be in its very nature a tax upon the exercise of a privilege. What is the taxable privilege? Sale. Where? Within the state, namely, within the state's taxing jurisdiction. In this case the sale concededly took place in territory under exclusive federal jurisdiction. That is the beginning and end of the case.

The State Supreme Court has never suggested that the tax is levied with reference to anything but a sale. On the contrary it states that the question in this case is

> "whether *sales* and deliveries of gasoline at a military reservation under the sole jurisdiction of the United States * * * are to be excluded in fixing the license fees to be paid by the distributor"

and concludes that the

> "manifest intention of the act was to include all *sales* completed within the geographical confines of the state and for this purpose said military reservation was to be included like all other territory."

The *sale* is the thing. If there be one that the state can reach within its jurisdiction, there is a tax; if there be none, there is no tax. The act has always been construed in one way, the only way its clear and direct terms permit. It imposes a license tax upon the exercise of a privilege. The person taxed for exercising the privilege is the distributor. The privilege taxed is the making of a sale. The tax is paid by the distributor but collected from the consumer. The measure of the tax is the amount sold, and in applying the measure the state is necessarily confined to events occurring and privileges exercised within its jurisdiction.

The Attorney General recognizes that a direct property tax cannot be levied by the state or county in the Presidio because of the ruling of this court in *Surplus Trading Company vs. Cook*, 281 U. S. 647. He suggests, however, that there may be a difference in the case of a privilege or occupation tax (Appellee's Br. p. 13). But as far as juris-

dictional authority to impose a tax is concerned, there can be no difference between a direct tax and an excise tax. This Court has so ruled in *State Tax on Foreign Held Bonds*, 82 U. S. 300, 319.

The Attorney General is therefore compelled to seek some taxable incident within state jurisdiction to support the levy. He suggests various theories but he can point to no syllable in the statute to support any of them. On pages 8 and 9 of Appellee's Brief we find the following:

> "The State of California * * * is not attempting to tax anything tangible or intangible within the Presidio. It is not concerned with the Presidio as a matter of fact. It is concerned with what is done in the State by a corporation subject to the laws of the State. The tax operates upon the corporation, not by reason of any jurisdiction which the State attempts to exercise within the Presidio, but by reason of jurisdiction which the State has over the corporation and over its operations in the State generally. Without a place of business in the State and without gasoline produced in or imported into the State no sale could have been made to the Post Exchange by appellant."

This theory of the net hints at the possibility that the tax may be upon the company for the privilege of doing business generally or for producing or importing gasoline. But the gasoline tax act does not impose a tax upon the privilege of doing business generally. That purpose is accomplished by the State Bank and Corporation Franchise Tax Act which this Court had before it in *Pacific Company Ltd. v. Johnson*, 285 U. S. 480. Nor is the tax levied upon production or importation. The state Supreme Court has never suggested any construction of the act which would support this strained proposal of the Attorney General. Certainly it has not done so in this case. If anything, it has done the opposite by holding that the legislative intent was to reach all sales, as such, within the Presidio. Furthermore, a state has no power to levy an excise tax

measured solely by business done or a privilege exercised entirely beyond its jurisdiction. There is no more justification for the inclusion of Presidio sales than there would be for the inclusion of Oregon and Washington sales.

Again on page 16 of Appellee's Brief we find:

> "The State imposes a tax upon a resident corporation measured in part by a transaction originating outside the Presidio but terminated within the Presidio by a simple act of delivery of goods, wares or merchandise. Had the Government desired to do so, it could have prevented the delivery within the Presidio, and thus the transaction would have been completed on the outside. But the Government consented to delivery within its borders * * * and to this extent it waived whatever jurisdictional powers it might otherwise have exerted and no immunity attached to the transaction."

It is difficult to discover precisely what this argument imports. The term "resident corporation" and the reference to a transaction originating outside the Presidio suggest incidents within state jurisdiction but like the preceding quotation they come no nearer to the text of the act and the thing taxed. The intimation of a waiver can hardly be intended seriously. Is immunity from direct property taxation waived by officers and enlisted men who take tangible personalty to their homes on the reservation and keep it there?

The Attorney General's real difficulty is well shown on page 20 of his brief. He says:

> "Had the California statute imposed the tax upon *withdrawal* of the gasoline from storage there could be no question of its validity in that respect. * * *
>
> "Can it make any difference or can any distinctions be drawn merely because the tax is payable by reason of a *sale* of gasoline instead of upon its *withdrawal* from storage?
>
> "It would appear that no sound reason can be advanced why the tax is not as valid in the former instance as in the latter."

This is the very point at issue. The California statute does not tax *withdrawal*, an event occurring solely which in this case might properly be assumed to have occurred within the state's jurisdiction. It taxes *sale*, an event which in this case occurred beyond its jurisdiction. In our opening brief we pointed out the reasons for the legislative policy which confines the tax to sales and excludes withdrawal and use. We also referred to the gasoline tax cases in which this court has upheld a levy upon withdrawal, storage or use. We may now refer to the most recent pronouncement by this court, to similar effect, in *Federal Compress and Warehouse Company v. McLean*, sustaining the Mississippi tax on the operation of a cotton compress and a warehouse within the state. We believe we appreciate fully the force of these decisions and if the California statute taxed withdrawal, as the Attorney General suggests, or any other privilege exercised within its jurisdiction and properly taxable, a different question would be presented in this case.

On page 23 of Appellee's Brief the following appears:

> "Under our statute, although the tax is a privilege tax imposed upon the distributor of motor vehicle fuel, the intent of the law is that the distributor shall collect the tax from the consumer who uses such fuel in motor vehicles operated upon the public highways of the State. * * *
>
> "It is an undisputed fact that all distributors do include the tax in the price charged for gasoline and that the consumers ultimately pay the tax."

Again on page 65,

> "The tax is, in effect, a just and reasonable charge for the use of State highways and other facilities furnished to the motoring public by the State."

Here the intimation is, that since the consumer ultimately pays the tax, the thing taxed is the consumer's use of the highways. But the California legislature has

not said so. A person purchasing gasoline outside the state is not taxed for using the highways within it. There is no measure for a highway tax. The tax is upon the seller for the privilege of making a sale and not upon the consumer for the privilege of using the highway.

In every instance, we are returned to our starting point. This court can hardly be asked to disregard the nature of the tax imposed by the California law, as defined by the State Supreme Court, and to write a new measure for the purpose of finding a taxable incident within state jurisdiction.

Throughout, we have said that the California gasoline tax is properly to be regarded as a license tax levied upon the distributor or seller for the privilege of making a sale. But whether it be labeled a sales tax or business tax or distributor's tax, it is clear in this case that the sale was made, the business done, and the distribution accomplished entirely within the Presidio and beyond state jurisdiction.

The Attorney General dismisses as not in point and without analysis the two recent decisions of this court in *Surplus Trading Company vs. Cook*, 281 U. S. 647, and *United States vs. Unzeuta*, 281 U. S. 138, and the decision of the Supreme Court of Washington in *Concessions Company vs. Morris*, 109 Wash. 46. These decisions are treated at length in our opening brief and we earnestly submit that they govern this case.

The Attorney General also disposes of *People v. Mouse*, 203 Cal. 782, certiorari denied by this court, 278 U. S. 614, as not pertinent, despite the fact that that case holds, as the trial judge states in his opinion, that if a thief were to steal at the Presidio the gasoline here involved, the state would be powerless to punish him. The trial judge aptly observes (R. p. 62):

> "How can it be said that goods delivered in the Presidio are still in the State for the purpose of measuring a tax when a theft of the same goods would not be 'in the State' for the purpose of trial and punishment?"

Brief reference may be made to the recent decision of the Circuit Court of Appeals for the Fifth Circuit in *Pan American Petroleum Corporation v. Alabama*, cited by the Attorney General and not yet reported. The jurisdictional question here presented was not decided, the court holding that because the Alabama statute included the term "*with drawing from storage*," it was unnecessary to pass upon our question. Concerning the character of the Post Exchange as a federal instrumentality, the only authority cited by the court for the statement which is quoted in Appellee's Brief (p. 60) is the decision of the Supreme Court of California in this case now before this court for review.

The Attorney General complains that if this court reverses the decision of the State Supreme Court,

> "the State is effectually barred from the exercise of its legitimate functions, no matter what its laws may provide, merely on the ground that jurisdiction has been ceded to the Federal Government over the territory comprising the reservation" (Appellee's Brief, p. 10).

It is to be assumed that this is precisely what the state and the federal government contemplated when the cession of 1897 was made. And may it not be suggested that if after cession the State were permitted to invade federal territory the federal government itself might well be "effectually barred from the exercise of its legitimate functions"?

Respectfully submitted,

OSCAR SUTRO,
FELIX T. SMITH,
V. K. BUTLER, JR.

Washington, D. C.;
January 9, 1934.